Ramzan bin Jantan v Timbalan Ketua Polis Johor & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01–56 OF 2005
MOHD GHAZALI, LOW HOP BING AND HASAN LAH JJCA
25 JANUARY 2008

Police — Disciplinary proceedings — Dismissal — Previous disciplinary offences — Whether taken into account — Whether appellant deprived of reasonable opportunity to be heard — Whether constituted prosedural unfairness

The appellant was holding the rank of Lance Corporal with the Royal Malaysian Police Force ('the police force') but was dismissed with effect from 7 June 1996 as a result of disciplinary action taken against him. By two letters each referring to a separate charge, the appellant was informed of an impending disciplinary action against him. At the end of the proceedings, the adjudicating authority found the appellant guilty of the first charge and consequently fined the equivalent of five days wages. For the second charge, to which the appellant had pleaded guilty, he was dismissed from the police force. Hence this appeal. The appellant submitted that his appeal was premised on two issues, namely; (a) that the appellant was deprived of a reasonable and proper opportunity to explain his previous records following the principle enunciated in *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364; and (b) that there had been a breach of the '*audi alteram partem* rule', viz, the appellant was deprived of a reasonable opportunity to be heard. He further argued that the adjudicating authority had looked into and taken into consideration the records of previous disciplinary offences before it meted out the severest punishment; (a) without giving notice to him; (b) without even reading the previous records of offences to him; and (c) without asking him whether he had anything to say, correct or contradict. The respondent on the other hand submitted that: the adjudicating authority had not taken the previous disciplinary offences of the appellant into account and only took into account the importance of discipline, the police force and public service regulations.

Held, allowing the appeal with costs here and below:

(1) The part of the minutes of proceedings in relation to the second charge which read, '*13 Kesalahan yang lepas yang tercatit di dalam Penyata Diri (i)*' would clearly denote that the disciplinary authority presided over by

A the first respondent went through the appellant's previous disciplinary offences and made it part of the records of proceedings before he passed the severest sentence, viz, dismissal from the police force. The first respondent was the same adjudicating officer who presided over both the first and second charges against the appellant. He had taken note of
B the previous disciplinary offences when he heard the first charge. Thus, he had knowledge of the same when he went on to hear the second charge. To suggest that he did not take it into account was preposterous (see para 42).

C (2) The learned judge made an erroneous finding when he said that in considering the appropriate punishment 'the adjudicating authority had clearly not taken the previous disciplinary offences into account'. This would seem to be in opposition to what he said further in his grounds of judgment, namely, that 'granted, the adjudicating authority
D had knowledge of the alleged previous disciplinary offences' but 'there is nothing in the transcript to indicate that the disciplinary record had influenced the adjudicating authority or the punishment imposed of the adjudicating authority' (see para 43).

E (3) The mind of the adjudicating authority would have been prejudiced by the appellant's previous disciplinary offences and his past records had been taken into account when it imposed the severest punishment on him. Further, having taken into account the appellant's past records, the adjudicating authority did not afford him the opportunity to explain or
F controvert his records of service which clearly played a part in influencing its decision to impose the severest punishment, ie, dismissal. That being the position, it would constitute procedural unfairness and rendered the dismissal bad notwithstanding that the appellant had pleaded guilty to the second charge. The disciplinary authority had
G infringed the rule of natural justice. The appellant's past records clearly had a 'damning effect' on his case and he should be given a right to be heard on same (see para 44).

[Bahasa Malaysia summary

H

Perayu memegang jawatan Lans Korporal dengan Polis DiRaja Malaysia ('pasukan polis') tetapi dipecat bermula dari 7 Jun 1996 kerana satu tindakan tatatertib terhadapnya. Melalui dua surat; masing-masing merujuk kepada pertuduhan yang berasingan, perayu dimaklumkan akan satu tindakan
I tatatertib yang diambil terhadapnya. Di akhir prosiding, pihak berkuasa pengadilan mendapati perayu bersalah atas tuduhan pertama dan didenda bersamaan dengan lima hari gaji. Untuk tuduhan kedua yang mana perayu mengaku bersalah, beliau telah dibuang kerja daripada pasukan polis. Perayu menghujahkan bahawa rayuan beliau berdasarkan atas dua isu, iaitu:

(a) bahawa perayu kehilangan peluang yang munasabah dan wajar untuk menjelaskan rekod lampaunya mengikut prinsip yang dinyatakan di dalam kes *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364; dan (b) bahawa terdapat perlanggaran 'peraturan *audi alteram partem*', di mana perayu kehilangan peluang yang munasabah untuk didengar. Perayu selanjutnya menghujahkan bahawa pihak berkuasa pengadilan telah mengambilkira kesalahan-kesalahan tatatertibnya yang terdahulu sebelum beliau dikenakan hukuman yang seberat-beratnya: (a) tanpa memberi notis kepadanya; (b) tanpa membaca rekod-rekod lampau kesalahan-kesalahan perayu; dan (c) tanpa bertanyakan perayu sama ada beliau ingin mengatakan apa-apa, untuk memperbetulkan atau menyangkal. Sebaliknya, responden-responden menghujahkan bahawa pihak berkuasa pengadilan tidak mengambilkira rekod-rekod tatatertib perayu yang lampau dan hanya mengambilkira kepentingan disiplin, pasukan polis dan perkhidmatan awam.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan di Mahkamah Tinggi:

(1) Bahagian minit prosiding berhubung dengan pertuduhan kedua yang menyatakan, '*13 Kesalahan yang lepas yang tercatit di dalam Penyata Diri (i)*' dengan jelas menunjukkan bahawa pihak berkuasa pengadilan yang dipengerusikan oleh responden pertama telah menyemak kesalahan-kesalahan perayu yang lepas dan menjadikannya sebahagian rekod prosiding sebelum beliau mengenakan hukuman yang begitu berat iaitu dibuang kerja daripada pasukan polis. Responden pertama adalah pegawai pengadilan yang juga mempengerusikan kedua-dua tuduhan pertama dan kedua terhadap perayu. Beliau telah mengetahui kesalahan tatatertib perayu yang lepas apabila mendengar tuduhan pertama. Dengan itu, beliau mempunyai pengetahuan akan kesalahan tersebut apabila beliau mendengar tuduhan kedua. Untuk mencadangkan bahawa beliau tidak mengambilkira perkara tersebut adalah tidak munasabah (lihat perenggan 42).

(2) Hakim yang bijaksana telah membuat satu kesilapan penemuan apabila beliau mengatakan bahawa dalam menentukan hukuman yang wajar 'the adjudicating authority had clearly not taken the previous disciplinary offences into account'. Ini kelihatan bertentangan dengan apa yang dinyatakan selanjutnya di dalam alasan penghakimannya, iaitu, 'granted, the adjudicating authority had knowledge of the alleged previous disciplinary offences' tetapi 'there is nothing in the transcript to indicate that the disciplinary record had influenced the adjudicating authority or the punishment imposed of the adjudicating authority' (lihat perenggan 43).

A (3) Pemikiran pihak berkuasa pengadilan mungkin telah diprejudiskan oleh kesalahan-kesalahan tatatertib perayu yang lepas dan rekod-rekod lampau perayu telah diambilkira apabila ia menjatuhkan hukuman yang paling berat terhadap perayu. Selanjutnya, selepas mengambilkira rekod-rekod lampau perayu, pihak berkuasa pengadilan tidak
B memberikannya peluang untuk menerangkan atau menyangkal rekod perkhidmatannya yang jelas menunjukkan memainkan peranan yang penting dalam mempengaruhi keputusan untuk mengenakan hukuman yang paling berat iaitu dibuang kerja. Memandangkan, kedudukan sebegitu, ia membentuk satu ketidakadilan prosedur dan menyebabkan
C pemecatan yang salah walaupun perayu mengaku bersalah kepada tuduhan kedua. Pihak berkuasa pengadilan telah melanggar kaedah keadilan asasi. Rekod-rekod lampau perayu jelas mempunyai satu 'kesan yang memudaratkan' pada kes perayu dan beliau sepatutnya
D diberikan satu hak untuk didengar atas perkara tersebut (lihat perenggan 44).]

Notes

For cases on dismissal, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue)
E paras 1197–1229.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 1470 (refd)

Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin
F *Rashid* [2006] 2 MLJ 108 (refd)

Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor [2001] 2 MLJ 257 (refd)

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor
G [1990] 3 MLJ 364 (refd)

Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor [2006] 6 MLJ 229 (refd)

Legislation referred to

H Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 regs 2, 6(2), (10), Schedule para (7)
Public Officers (Conduct and Discipline) (General Orders Chapter 'D') 1969
Public Officers (Conduct and Discipline) Regulations 1993 reg 10(1)

I

Appeal from: Civil Suit No 22–10 of 1999 (High Court, Muar)

G Subramaniam Nair (Maniam Nair & Co) for the appellant.
Rozi Bainon (Federal Counsel, Attorney General's Chambers) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] The appellant was holding the rank of lance corporal with the Royal Malaysian Police Force ('the police force') prior to his dismissal. At the material time, he was attached to the Police District Headquarters, Muar, Johor as a vehicle driver. He was dismissed with effect from 7 June 1996 as a result of disciplinary action taken against him.

[2] By writ action against the Deputy Chief Police Officer, Johor and the Government of Malaysia (the first and second respondents respectively), the appellant prayed for the following reliefs, namely:

(a) for a declaration that his dismissal from the police force is null and void; and

(b) for his reinstatement and for the payment of his wages and other benefits computed from 7 June 1996.

[3] The suit was dismissed with costs by Jeffrey Tan J on 9 May 2005 and hence, this appeal.

THE BACKGROUND

[4] By two letters both dated 11 May 1996, the appellant was informed of an impending disciplinary action against him scheduled to be held on 4 June 1996 at the Police District Headquarters, Muar, Johor. Each letter referred to a separate charge. The letters were served on him on 13 May 1996.

[5] The first charge states that the appellant has failed to declare an asset, namely, a motorcar bearing registration No JBN 7796 ('the said motorcar') owned by his wife, Azidah bte Musa to his head of department in accordance with reg 10(1) of the Public Officers (Conduct and Discipline) Regulations 1993 and hence has committed a disciplinary offence under para (7) of the Schedule to the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 and punishable under the same ('the said Regulations').

[6] The second charge states that at about 11.20am on 2 May 1996 at the Police District Headquarters, Muar, in the course of an official inquiry relating to Muar LMAF (TT): 27/96, the appellant confirmed that he was residing outside the district of Muar, namely, in Kg Serkam, Merlimau, Melaka without the consent of the officer in charge of the police district of

Muar and hence has committed a disciplinary offence under para (7) of the Schedule to the said Regulations and punishable under the same.

[7] It would be appropriate to mention here that reg 2 of the said Regulations reads:

> Any officer who is found guilty of a disciplinary offence as specified in the Schedule hereto shall be liable to any of the punishments as specified in that Schedule.

The Schedule to the said regulations in relation to para (7) reads:

> Any junior police officer or constable who —
>
> (7) wilfully disobeys any lawful order or command, whether written or otherwise, or without good cause omits or neglects to carry out promptly any such order or command or perform any duty;
>
> shall be guilty of an offence against discipline and shall be liable to any of the following punishments:
>
> (a) Dismissal;
>
> (b) Reduction in rank;
>
> (c) Deferment of increment;
>
> (d) Stoppage of increment;
>
> (e) Fine not exceeding one month's pay;
>
> (f) Severe reprimand;
>
> (g) Reprimand;
>
> (h) Extra guard duty for a time not exceeding four hours a day for a period not exceeding five days;
>
> (i) Fatigue duty for a time not exceeding four hours a day with ten minutes rest after each hour of the fatigue duty for a period not exceeding five days;
>
> (j) Extra drill for a time not exceeding two hours a day with ten minutes rest after each hour of the extra drill for a period not exceeding five days:
>
> Provided that the time of rest referred to in subparagraph (i) and (j) are not counted as punishment time.

THE FIRST CHARGE

[8] The disciplinary proceedings in relation to the first charge was held at 10.15am on 7 June 1996 and the first respondent was the adjudicating officer

('the adjudicating authority'). The appellant claimed trial. One ASP Hashim bin Sadimin (PW1) who was the prosecution's witness said he received information that the appellant was using the said motorcar and was residing outside the 'Kontingen Johor'. In the course of investigation he found that the said motorcar was owned by the appellant's wife, Azidah bte Musa. The appellant did not cross-examine this witness.

[9] Abdol bin Hj Salleh, a police superintendent (PW2) said he was informed by PW1 that the appellant was not residing in the district of Muar and hence instructed that an investigation be carried out by the police force disciplinary section. The investigation showed that the appellant occasionally used the said motorcar to come to work. It was also shown that the said motorcar belongs to the appellant's wife and that the appellant did not declare the same to his head of department.

[10] PW3, an officer from the Road Transport Department confirmed from his records that the registered owner of the said motorcar is Azidah bte Musa.

[11] In his defence, in answer to the questions posed to him, the appellant said as follows:

(a) that he stated during the course of investigation on 2 May 1996 that his father-in-law was the owner of the said motorcar which was purchased in his wife's name; and

(b) he never declared the same to his head of department as he presumed that the owner of the said motorcar was not his wife.

[12] At the end of the proceedings, the adjudicating authority found the appellant guilty of the first charge. In mitigation, the appellant reiterated that his father-in-law was the owner of the said motorcar and not his wife. The minutes of proceedings of the adjudicating authority then showed the following:

13 Kesalahan-kesalahan yang lepas yang tercatit di dalam Penyata diri:

(i) JB Kes 92/88 tarikh 19/3/88 — kerja lebih masa dua jam selama dua hari;

(ii) JB kes 109/88 tarikh 28/5/88 — kawad tambahan satu jam satu hari;

(iii) JB kes 108/88 tarikh 28/5/88 — kawad tambahan dua jam satu hari;

(iv) JB kes 112/88 tarikh 28/5/88 — celaan;

(v) JB kes 111/88 tarikh 28/5/88 — celaan;

(vi) JB kes 110/88 tarikh 28/5/88 — celaan;

(vii) MUAR 19/95 tarikh 2/5/95 — kerja memenatkan dua jam selama satu hari.

14 Hukuman yang diberi:

Denda lima (5) hari gaji.

THE SECOND CHARGE

[13] The disciplinary proceedings in relation to the second charge was also held on 7 June 1996 but at 3.20pm before the same adjudicating authority. The minutes of the proceedings showed that the charge was read, explained and understood by the appellant. The appellant pleaded guilty to this charge.

[14] The minutes of the proceedings then read as follows:

9 Keterangan-keterangan yang menyokong pertuduhan:

(i) Semasa siasatan rasmi rujukan Muar LMAF (TT) 27/96 YKT telah membuat pengakuan bahawa beliau tinggal di luar Daerah Muar, iaitu di Kg Serkam, Merlimau, Melaka sejak bulan Januari, tanpa kebenaran KPD Muar.

(ii) Menurut rekod pentadbiran IPD Muar, YKT dibenarkan/diluluskan tinggal di No 4948 Taman Sri Gading, Parit Bunga, Muar, Johor. Surat kelulusan diberi oleh KPD Muar untuk beliau layak menerima sewa rumah sebanyak RM120 sebulan mulai 5/9/94.

(iii) Oleh yang demikian YKT engkar perintah.

10 Penyataan dalam menerangkan kesalahan.

(i) Sejak bulan Januari, 1996 YKT telah terbukti tinggal di sebuah rumah di Kg Serkam, Merlimau, Melaka, melanggar arahan dan kelulusan KPD Muar yang hanya membenarkan beliau tinggal di No 4948 Taman Sri Gading, Parit Bunga, Muar, Johor.

11 Keputusan: Didapati bersalah seperti pertuduhan.

Rayuan:

(i) Yang kena tuduh menyatakan dia tidak ingin tinggal di kampung Serkam, tetapi tuan pemunya rumah yang disewa arahkan dikeluar

segara. Dia terpaksa tinggal di rumah lain, dan buat sementara tinggal di Kg Serkam. Jarak dari tempat kerja ke rumah dia duduk sejak Januari 1996 hingga hari ini ialah kira-kira 18 km atau ½ jam perjalanan kenderaan bas.

(ii) Beliau mohon maaf atas kesilapan yang dilakukan, dan mengaku bersalah. Dia kesal dengan tindakan yang tidak mengikut peraturan.

(iii) Meminta diringankan hukuman yang akan dikenakan.

13 *Kesalahan yang lepas yang tercatit di dalam Penyata Diri (i)*

14 Hukuman yang diberi:

Mengambil kira kepentingan disiplin dan peraturan PDRM dan perkhidmatan awam keseluruhannya, saya jatuhkan L/Kpl 11348 Ramzan bin Jantan hukuman buang kerja mulai hari ini.

(tt) 9/6/96.

(Emphasis added.)

[15] Thus, with regard to the first charge the appellant was fined the equivalent of five days wages and for the second charge he was dismissed from the police force.

THE PROCEEDINGS IN THE HIGH COURT

[16] The minutes of proceedings as recorded by the learned judge reflected that in the course of the trial, with regards to the first charge, counsel for the appellant argued that the adjudicating authority considered 'the seven previous disciplinary cases against the plaintiff and the punishment without giving notice (to) the plaintiff that those previous misconduct would be taken into account before sentence is passed, and without giving an opportunity to the plaintiff to explain or contradict'. Counsel submitted that the adjudicating authority 'was clearly influence(d) by those seven misconduct'. Counsel cited *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 to support his argument.

[17] In response, federal counsel for the respondents pointed out that the position in *Shamsiah* was different, namely, it was a case under the Public Officers (Conduct and Discipline) (General Orders Chapter 'D') 1969 where there was no right to an oral hearing; the plaintiff in that case was given a show cause letter and was given a chance to answer but was not given an opportunity to rebut and contradict her record whereas in the instant case there was no provision for the appellant to be informed of his previous record.

[18] With regards to the second charge, counsel for the appellant argued that the same adjudicating authority who decided the first charge had previous knowledge of the appellant's seven previous disciplinary cases and had recorded it in his minutes as follows:

> 13 Kesalahan yang lepas yang tercatit di dalam Penyata Diri (i).

Counsel commented that the adjudicating authority 'has stated in two lines the past record'. He then submitted as follows:

> Therefore chairman had prejudiced his mind with previous record. That was the reason for the hash (sic) punishment.
>
> The past record must have been taken into account.
>
> Alternatively, the plaintiff was not told of the consequences of PG. I refer to reg 6(10). I have no authority on reg 6(10).

[19] Regulation 6(10) of the said Regulations which deal with 'Orderly Room Procedure' reads:

> The adjudicating authority shall at all times satisfy itself that the officer understands the nature and effect of the proceedings and has a proper opportunity to defend himself.

[20] In response to the above, federal counsel for the respondents argued as follows:

> On the facts, @ DB8, since previous records was not mentioned, I say it was not considered. *Shamsiah*'s case could not apply.
>
> Regulation 6(10) — charge was read and explained — see DB6.
>
> No duty to explain consequences of PG.
>
> No failure in procedure.

[21] The arguments canvassed by counsel for the appellant in the court below can be summarised as follows:

(a) the same adjudicating authority presided over both disciplinary charges;

(b) with regards to the first charge which was heard and disposed in the morning of 7 June 1996, the adjudicating authority had taken note of the appellant's seven previous disciplinary cases and hence had knowledge of the same;

(c) with regards to the second charge which was heard and disposed in the afternoon of the same day, the adjudicating authority again had taken note of the same previous disciplinary cases;

(d) premised upon these facts, the mind of the adjudicating authority would have been prejudiced by those seven previous disciplinary offences;

(e) the appellant's past record had been taken into account and that was the reason for the harsh punishment, viz, dismissal from the police force;

(f) the appellant was not told of the consequences of his plea and this would denote that the adjudicating authority had therefore not complied with reg 6(10) of the said Regulations; and

(g) that the adjudicating authority could not consider previous disciplinary offences without first giving notice to the appellant that his previous disciplinary offences would be considered and without first giving an opportunity to the appellant to admit or controvert them.

[22] To support his arguments counsel for the appellant referred to *Shamsiah*. In that case, the core of the appellant's complaint was the fact that the respondent, ie the Public Service Commission in arriving at its decision to dismiss her from service had taken into consideration extraneous matters, namely, the appellant's record of past conducts which were entered in her record of service and produced by the Director-General of the Government Printers Department to the Public Service Commission without giving her an opportunity to explain, contradict or rebut them. It was held by the Supreme Court that the Public Service Commission had infringed the rule of natural justice in not affording the appellant an opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the Public Officers (Conduct and Discipline) (General Orders Chapter 'D') Regulations 1969.

[23] In response, federal counsel for the respondents in the instant case insisted that the adjudicating authority had not taken into account the disciplinary record of the appellant. She pointed out that the charge was read and explained to the appellant and there was no legal requirement to explain the consequences of a plea of guilt, and hence there was no failure in the procedure.

[24] In his grounds of judgment, the learned judge discussed at length the judgment of the Supreme Court in *Shamsiah*. He then said:

> The law is therefore clear cut. In considering the appropriate punishment, an adjudicating authority can take into account the past record. But the officer must be apprised of his past record and the fact that it would be taken into account. The officer must be given a fair opportunity to rebut or controvert the past record.
>
> The instant facts are also unambiguous. According to the notes of the enquiry (see DB8), in considering the appropriate punishment, the adjudicating authority had clearly not taken the previous disciplinary offences of the plaintiff into account

— '*Mengambil kira kepentingan disiplin dan peraturan PDRM dan perhidmatan awam keseluruhannya, saya jatuhkan hukuman 'BUANG KERJA' mulai hari*'. Granted, the adjudicating authority had knowledge of the alleged previous disciplinary offences. But there is nothing in the transcript to indicate that the disciplinary record had influenced the adjudicating authority or the punishment imposed of the adjudicating authority. In considering the appropriate punishment, the adjudicating authority had only taken into account the discipline of the force and its regulations, which were not extraneous matters. On the facts, it was not demonstrated that the adjudicating authority had infringed any rule of natural justice.

It was also not demonstrated that the adjudicating authority had not complied with reg 6(10) which required that the adjudicating authority 'shall at all times satisfy itself that the officer understands the nature and effect of the proceedings and had a proper opportunity to defend himself. From the record, the adjudicating authority must have been so satisfied. The charge had been framed in accordance with an offence prescribed in the Schedule to the 1970 Regulations. The charge had described the offence. The charge had been communicated to the plaintiff on 13 May 1996 (see DB4), ie some three weeks before the enquiry. The plaintiff had been informed that he could request for copies of or be given access to documents, and that he could apply to be represented by a police officer of his choice. At the enquiry, the charge was read and explained to the plaintiff who duly acknowledged that the charge had been read and explained and that he (plaintiff) understood the same (see DB6). What was more, the plea in mitigation only and clearly evinced that the plaintiff was fully cognisant of the charge and proceedings. Given so, the adjudicating authority had done all things possible to satisfy itself that the plaintiff understood the nature and effect of the proceedings and had a proper opportunity to defend himself.

There was no infringement of natural justice or breach of reg 6(2). Accordingly, this action is dismissed with costs.

[25] Regulation 6(2) of the said Regulations, which deals with 'Orderly Room Procedure', reads:

(2) If the officer pleads guilty —

(a) the adjudicating authority shall record briefly the facts in support of the charge and shall explain them to the officer. The facts will be obtained by questioning any officer or witness who has knowledge of the facts, or, if the adjudicating authority has been supplied with any documents containing the facts of the charge, by reference to such documents;

(b) the officer shall then be invited to make any statement he wishes in extenuation of the offence. Such statement shall be recorded, or if he has nothing to say, such fact shall be recorded;

(c) the adjudicating authority shall then record a finding of guilt and award a punishment in respect of the offence.

THE APPEAL

[26] Before this court, counsel for the appellant submitted that the appellant's appeal is premised on two issues, namely:

(a) that the appellant was deprived of a reasonable and proper opportunity to explain his previous record following the principle enunciated in *Shamsiah*; and

(b) that there has been a breach of the 'audi alteram partem rule', viz, the appellant was deprived of a reasonable opportunity to be heard.

[27] Counsel for the appellant argued that the issue is whether the adjudicating authority took into account previous records of the appellant before imposing the severest punishment for the second charge. He submitted that it is clear from the minutes of proceedings of the adjudicating authority that it had gone through the records of previous disciplinary offences. The full facts of the records of previous disciplinary offences were brought to the attention of the adjudicating authority and was within its knowledge when it went on to consider the second charge and meted out the severest punishment.

[28] Counsel for the appellant then argued that the adjudicating authority had looked into and taken into consideration the records of previous disciplinary offences before it meted out the severest punishment:

(a) without giving notice to the appellant;

(b) without even reading these previous records of offences to the appellant; and

(c) without asking the appellant whether he has anything to say, correct or contradict;

thus, he did not give an opportunity to the appellant to explain or controvert thereby breaching the *Shamsiah*'s principle.

[29] Counsel for the appellant consequently argued that the records further showed that the adjudicating authority had taken into account the previous records from the following words:

> ... mengambilkira kepentingan disiplin dan peraturan PDRM ...

With regards to this, counsel pointed out that the learned judge, in his grounds of judgment, interpreted these words in the following manner:

A The instant facts are also unambiguous. According to the notes of the enquiry (see DB8), in considering the appropriate punishment, the adjudicating authority had clearly not taken the previous disciplinary offences of the plaintiff into account — 'Mengambil kira kepentingan disiplin dan peraturan PDRM dan perkhidmatan awam keseluruhannya, saya jatuhkan hukuman 'BUANG KERJA' mulai hari ini.' Granted, the adjudicating authority had knowledge of the alleged previous disciplinary offences. But there is nothing in the transcript to indicate that the disciplinary record had influenced the adjudicating authority or the punishment imposed of the adjudicating authority. In considering the appropriate punishment, the adjudicating authority had only taken into account the discipline of the force and its regulations, which were not extraneous matters. On the facts, it was not demonstrated that the adjudicating authority had infringed any rule of natural justice.

[30] Counsel for the appellant submitted that the learned judge is wrong to come to the above conclusion because there was, indeed, no basis for the said finding by the learned judge.

[31] In response, federal counsel for the respondents submitted as follows:

(a) it is 'crystal clear' that in considering the appropriate punishment, the adjudicating authority had not taken the previous disciplinary offences of the appellant into account;

(b) that the adjudicating authority only took into account the importance of discipline and the police force and public service regulations; the exact words recorded by the adjudicating authority in its minutes of the proceedings read:

> Mengambil kira kepentingan disiplin dan peraturan PDRM dan perkhidmatan awam keseluruhannya, saya jatuhkan L/Kpl 11348 Ramzan bin Jantan hukuman 'Buang Kerja' mulai hari ini; and

(c) that the adjudicating authority has complied with reg 6(10) of the said Regulations.

[32] With regards to the averment that there has been a breach of the 'audi alteram partem rule', federal counsel submitted as follows:

(a) that the adjudicating authority had complied with reg 6(10) of the said Regulations;

(b) that there was no infringement of natural justice or breach of reg 6(2) of the said Regulations; and

(c) that the appellant has been given a full hearing before the adjudicating authority, viz, that he has answered a charge against him under the said Regulations and the adjudicating authority has assiduously followed the said Regulations.

[33] She then insisted that the learned judge was correct in dismissing the appellant's claim and as such prayed that the appeal be dismissed with costs.

JUDGMENT OF THIS COURT

[34] What is clear from the minutes of the proceedings before the adjudicating authority is that separate proceedings were held for each charge. With regards to the first charge, the proceedings were held in the morning. The appellant claimed trial to this charge and was found guilty. For this charge, the punishment imposed was a fine of the equivalent of five days wages.

[35] With regards to the second charge he was dismissed from the police force. This is the subject-matter of the instant appeal. The question that we need to determine here is whether the adjudicating authority had taken into account the appellant's past conduct without affording him the opportunity to explain or controvert his record of service when it imposed the punishment of dismissal. If this is answered in the positive, it would constitute procedural unfairness and renders the dismissal bad notwithstanding that the appellant had pleaded guilty to the charge. A case on point would be *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229, a decision of this court. In that case, the plaintiff, a lance corporal in the police force who was dismissed for misconduct filed an action challenging his dismissal. He sought, inter alia, a decree of declaration that his dismissal is void. The suit was dismissed by the High Court. He appealed to this court. The misconduct with which he was charged with was that he failed to make entries in his official pocket book for a period of about 10 days. He was on leave during that period and was instructed to return to duty at once. When his superior asked him to produce his pocket book for the purpose of endorsement, he explained that because of the urgent call to return to duty he had not had sufficient time to update the entries in his pocket book. Subsequently, the plaintiff received a notice of hearing of a disciplinary action into a charge against him for failure to maintain his pocket book. He pleaded guilty to the charge. It is not in dispute that in coming to his decision, the first defendant who was the adjudicating officer took into account the plaintiff's past conduct. It is also not in dispute that the plaintiff's past conduct was never put to him at the inquiry.

[36] In allowing the appeal, Gopal Sri Ram JCA (at p 236) said:

> There is another reason why the plaintiff's dismissal is void. It is this. As I have already said, his past conduct was taken into account by the defendants without putting it to the plaintiff in the first place. This constitutes procedural unfairness and renders the dismissal bad. On this point, I need do no more than to refer to the decision of the Supreme Court in *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364. There too the appellant Shamsiah's record of service was taken into account when imposing punishment on her. But that record was never shown to her. Her action challenging her dismissal failed before the High Court. On appeal, the Supreme Court reversed. In that context, Jemuri Serjan SCJ said:
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> > We wish to add that it has been held that tribunals must not continue privately to obtain evidence or other information between the conclusion of the hearing and the making of the decision, without notifying the parties so as to give them an opportunity to make submissions on it. See for example *R v Deputy Industrial Injuries Commissioner, ex p Jones* [1962] 2 QB 677 and *Fairmont Investments Ltd v Secretary of State for the Environment* [1967] 1 WLR 1255. It was manifestly demonstrated to us that the first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations.
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> For the reasons already given, I would allow the appeal and set aside the orders made by the High Court. The plaintiff shall have a decree of declaration that his dismissal is void. I also direct an inquiry into the emoluments and other benefits the plaintiff is entitled to receive from the defendants. Such inquiry shall be conducted by the senior assistant registrar of the High Court to whom I would remit the matter. The defendants shall bear the costs of this appeal and those incurred in the court below. The deposit in court shall be refunded to the plaintiff.

[37] In *Shamsiah*, the appellant, a book-binder with the Government Printing Department, was dismissed by the Public Services Commission after she was found guilty of negligence and dereliction of duty. She subsequently commenced an action in the High Court seeking a declaration that her dismissal was null and void, inoperative and of no consequence, that she was still a member of the General Public Services of the Federation and that therefore she should be reinstated as a book-binder on the same salary. She also sought for an order that an account be taken of all salaries, emolution and other benefits lawfully due to her from the date of her purported dismissal and that the same be paid to her with interest. Her application was dismissed in the High Court and she appealed. The core of the appellant's complaint was the fact that the Public Services Commission in arriving at its decision to dismiss her from service had taken into account extraneous matters, namely, the appellant's record of past conducts which were entered in her record of service and produced by the Director-General

of the Government Printers Department to the Public Services Commission without giving her an opportunity to explain, contradict or rebut them. A

[38] The Supreme Court held that the Public Services Commission had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the Public Officers (Conduct and Discipline) (General Orders Chapter 'D') Regulations 1969 and allowed the appeal. In delivering the judgment of the court, Jemuri Serjan SCJ said (at p 368): B C

> With all respect, the learned judge below should not have held that the first respondent was perfectly entitled to take into consideration the appellant's previous conduct without saying further that she must also be provided with an opportunity to explain or contradict them. The record of service as far as the disciplinary action before the first respondent was concerned contained extraneous matters, detrimental to the appellant's case. Even before the case of *Ridge v Baldwin* [1964] AC 40, Lord Denman CJ in *R v Smith* [1844] 5 QB 614 in dealing with the case of dismissal of a parish clerk held that even personal knowledge of the offence was no substitute for hearing the officer: his explanation might disprove criminal motive or intent and bring forward other facts in mitigation. We are not saying and should not be quoted as saying that the past record of the appellant should not be taken into account in considering her guilt or the appropriate punishment if she were found guilty of the charge. What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conducts, considering that the dismissal of a civil servant is no light matter. D E F
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> The matter is not free from authorities and the law on it is well settled. We find support for this proposition in many cases. In the case of *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] MLJ 169 Lord Denning at p 172 said: G
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> > If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* [1911] AC 179 down to the decision of Their Lordship's Board in *Ceylon University v Fernando* [1960] 1 WLR 223. It follows, of course, that *the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.* The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might to do so. The court will not go into the likelihood of prejudice. The risk of it is enough. *No one who has lost a* H I

case will believe he has been fairly treated if the other side has access to the judge without his knowing.

(Emphasis added.)

The case of *S Nanjundeswar v State of Mysore* AIR 1960 SC 159 is also relevant. At p 162, SR Das Gupta CJ says this:

I now come to the next contention of the learned advocate for the petitioner on which also I hold that this petition should succeed. It was pointed out to us that in making the order of punishment, the government has taken into consideration the previous conduct of the sub-inspector and has observed in its said order that the previous conduct of the sub-inspector was not above board. The learned advocate contended that no notice was given to the petitioner that his previous conduct would be taken into consideration in inflicting the punishment in question. He urged, relying on the said decision of the Supreme Court reported in (S) AIR 1957 SC 882, that principles of natural justice require that no materials should be relied upon against the person charged without his being given an opportunity of explaining them.

Past conduct, according to him, is a material which has been relied upon against the petitioner by the government in imposing the punishment in question and the government could not do so without giving the petitioner an opportunity of explaining the same. The petitioner in this case was not given such opportunity. In my opinion, this contention of the learned advocate is also sound. The observations of Their Lordships of the Supreme Court on which reliance has been placed, support this contention of the learned advocate for the petitioner. The petitioner was not given an opportunity of explaining his past conduct. The government, before relying on the said conduct, as it has done, for inflicting the punishment in question should have given the petitioner an opportunity of explaining it.

In this connection, reference may also be made to a decision of the Madhya Pradesh High Court reported in *Ramachandra Gopalrao v Deputy Inspector of Police* AIR 1957 Madh para 126. In that case, it was held *that no doubt competent authorities are entitled to take into consideration the record of the past service of a civil servant in order to determine the appropriate punishment, but before taking this into consideration, the civil servant must be apprised of the record of his past service and of the fact that it would be taken into account to decide the question of punishment.* In my opinion therefore, the petitioner's present contention should succeed.

(Emphasis added.)

[39] In *Mohd Noor bin Abdullah v Nordin bin Haji Zakaria & Anor* [2001] 2 MLJ 257, the appellant, a Lance Corporal in the police force, who was dismissed for misconduct by the disciplinary authority brought an action for a declaration that his dismissal was void because he did not get a fair procedure. In delivering the judgment of this court, Gopal Sri Ram JCA said (at pp 264–265):

That brings me to the present appeal which, in my view, is governed by *Ekambaram*'s case. The fact that the plaintiff in *Ekambaram* pleaded guilty whereas the instant appellant claimed trial was not a distinguishing factor of any significance upon the issue as to whether procedural fairness was meted out. The attempt by the judge in the court below to draw such a distinction was, with respect, an exercise in futility. What comes across is that the letter to the appellant in the present instance did not bring to his attention the contemplated punishments to make him appreciate the gravity of the situation, and thus enabling him to give a satisfactory explanation as best as he could. That in itself amounts to deprivation of procedural fairness.

[40] In *Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid* [2006] 2 MLJ 108 this court considered that it is a well established proposition, inter alia, that a decision by a public decision maker may be struck down by the courts on grounds of procedural unfairness or *Wednesbury* unreasonableness (see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 1470).

[41] In the instant appeal, the facts clearly showed that the adjudicating authority had in its possession the appellant's record of service including his previous disciplinary offences during the proceedings in relation to the second charge (as well as the first charge). The minutes of proceedings further showed that the adjudicating authority only saw it fit to just record in two lines, as pointed by counsel for the appellant, the appellant's previous disciplinary offences without resorting to the details as it had done during the proceedings in relation to the first charge (reproduced earlier). With regards to this, federal counsel for the respondents argued that it is 'crystal clear' that the adjudicating authority had not taken into account the previous disciplinary offences of the appellant into account. With due respect, we cannot see how it can be argued so.

[42] That part of the minutes of proceedings in relation to the second charge which read, '13 Kesalahan yang lepas yang tercatit di dalam Penyata Diri (i)' would clearly denote that the disciplinary authority presided over by the first respondent went through the appellant's previous disciplinary offences and made it part of the records of proceedings before he passed the severest sentence, viz, dismissal from the police force. The first respondent was the same adjudicating officer who presided over both the first and second charges against the appellant. He had taken note of the previous disciplinary offences when he heard the first charge. Thus, he had knowledge of the same when he went on to hear the second charge. To suggest that he did not take it into account is preposterous.

A **[43]** As such, we are of the view that the learned judge made an erroneous finding when he said that in considering the appropriate punishment 'the adjudicating authority had clearly not taken the previous disciplinary offences into account'. This would seem to be in opposition to what he said further in his grounds of judgment, namely, that 'granted, the adjudicating B authority had knowledge of the alleged previous disciplinary offences' but 'there is nothing in the transcript to indicate that the disciplinary record had influenced the adjudicating authority or the punishment imposed of the adjudicating authority'.

C **[44]** We are of the unanimous view that the mind of the adjudicating authority would have been prejudiced by the appellant's previous disciplinary offences and that the appellant's past records had been taken into account when it imposed the severest punishment on the appellant. Consequently, we are of the view that having taken into account the appellant's past records, the D adjudicating authority did not afford him the opportunity to explain or controvert his record of service which clearly played a part in influencing its decision to impose the severest punishment, ie dismissal under reg 2 of the said Regulations read together with para (7) of the Schedule to the same. That being the position, it would constitute procedural unfairness and E renders the dismissal bad notwithstanding that the appellant had pleaded guilty to the second charge. The disciplinary authority had infringed the rule of natural justice. The appellant's past records clearly had a 'damning effect' on the appellant's case and he should be given a right to be heard on same.

F **[45]** In conclusion, we find that this is clear case of deprivation of procedural fairness and that the circumstances show that there has been a breach of the 'audi alteram partem rule' and hence this appeal is allowed with costs here and below. We would set aside the order of the High Court and allow the declaration prayed for by the appellant, namely, that his dismissal G is void and for his reinstatement and would also direct an inquiry into the emoluments and other benefits that the appellant is entitled to receive and with interest from the respondents to be conducted by the senior assistant registrar of the High Court. The deposit is to be refunded to the appellant.

H *Appeal allowed with costs here and below.*

Reported by Sally Kee

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